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Nos. 78-432, 78-435, 78-436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *Petitioner*

v.

BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL CORPORATION, and UNITED STATES OF AMERICA, *Respondents*

KAISER ALUMINUM & CHEMICAL CORPORATION, *Petitioner*

v.

BRIAN F. WEBER, *Respondent*

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Petitioners*

v.

BRIAN F. WEBER, ET AL.

MEMORANDUM OF UNITED STEELWORKERS OF AMERICA IN OPPOSITION TO REQUEST BY UNITED STATES OF AMERICA, ET AL., IN NO. 78-436, FOR SUMMARY REMAND

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MEMORANDUM OF UNITED STEELWORKERS OF AMERICA IN OPPOSITION TO REQUEST BY UNITED STATES OF AMERICA, ET AL., IN NO. 78-436, FOR SUMMARY REMAND

The United Steelworkers of America, AFL-CIO-CLC (hereinafter "USWA"), Kaiser Aluminum & Chemical Corporation (hereinafter "Kaiser") and the United States (together with the Equal Employment Opportunity Commission) have each separately petitioned the Court for a writ of certiorari to review the judgment of the Fifth Circuit in this case. The United States in its petition, however, asks that this Court summarily vacate the judgment below

and remand the case "for reconsideration and supplementation of the record . . . ."[1]

In our petition we showed the importance of the issue decided by the court below and the urgency of this Court resolving that issue now. That issue, as phrased by the question presented in our petition, is:

> Does the prohibition against "discrimination" contained in Title VII of the Civil Rights Act of 1964 preclude an employer and union from voluntarily agreeing in collective bargaining to adopt an affirmative action program reserving 50% of the openings in a newly-created in-plant craft training program for black bidders, where there has been no prior discrimination against blacks at that plant but the progam is intended to alleviate one pervasive consequence of historic societal discrimination against blacks: the virtual absence of blacks from craft jobs.

The Government asks this Court to leave that issue unresolved; rather, the Government wishes to secure a remand in the hope that this case can be transformed into one raising different issues *not* presented on the existing record in this case: (1) Whether "Title VII [of the Civil Rights Act of 1964] permits affirmative remedial action by an employer and a union who have a reasonable factual basis for concluding that a plaintiff could establish a *prima facie* case of employment discrimination with respect to the plant and jobs in question," U.S. Pet. at 11; and/or (2) whether an "affirmative action program" can be upheld under Title VII where an " 'administrative body charged with the responsibility made determinations of past discrimination by the [industry] affected and fashioned [a remedy] deemed appropriate to rectify discrimination.' " *Id.* at 19. The Government acknowledges that neither of these issues is presented on the record in this case, but speculates that

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[1] Petition of the United States and EEOC (hereinafter "U.S. Pet.") at 20.

evidence might exist which could be used to recast the case in terms of one or both of these issues. Accordingly, the Government requests a remand to "supplement the record" with new evidence.

We show herein, first, that there is nothing inaccurate, misleading, or incomplete about the present record, on which both courts below proceeded; to the contrary, the existing record accurately and fully reflects the state of facts at the time Kaiser and USWA adopted their affirmative action program, and it reflects as well that the parties adopted that program for reasons other than those which the Government proffers to justify the program.

We then turn to a demonstration that the issues the Government speculates the case might present following remand are different from, but not as the Government contends narrower than, the issue actually raised by the case, and indeed, that the Government's hoped-for issues could be resolved in its favor only by surmounting legal difficulties which are not present in the case as it now stands.

Finally, we establish that it is the issue decided by the courts below and raised by our petition, and not the issues proposed by the Government, that will determine the legality of affirmative action programs which USWA has negotiated throughout the steel, aluminum, and can industries.

I.

A. The evidence in this case is that the affirmative action plan struck down by the courts below was not the product of a determination by Kaiser or USWA that a plaintiff might be able to prove a *prima facie* case of discrimination in hiring for craft jobs at the Gramercy plant. Nor was it a response to a finding by any government agency that such discrimination had occurred—there was no such finding, and the documents lodged by the Government with its petition do not indicate otherwise.

In fact, as the record shows, the quota program for filling craft apprenticeship vacancies at the Gramercy plant was established as part of a nationwide agreement between Kaiser and USWA covering 15 Kaiser plants throughout the United States. Kaiser and USWA entered into that program without making a plant-by-plant assessment of whether a plaintiff might be able to prove a *prima facie* case of discrimination against blacks in entry into craft jobs, and without such an assessment at the Gramercy plant in particular. USWA has entered into similar agreements with each of the other companies in the aluminum industry, with each of the companies in the can industry, with each of the companies in the steel industry (approximately 250 basic steel plants are covered by such agreements),[2] and with numerous other companies in a variety of other industries. In no industry were such agreements predicated upon an attempt by the parties to assess on a plant-by-plant basis the prognosis for suits claiming discrimination against blacks in entry into craft jobs; nor were they predicated upon findings by a government agency that discrimination had occurred at the covered plants.

Moreover, the affirmative action program USWA has negotiated in all of these instances, as exemplified by the program at issue here, is not tailored to benefit those who might have been victims of any discrimination that might have occurred in access to craft jobs at the covered plants. At the Gramercy plant, for example, craftsmen historically were hired "off the street,"[3] for neither blacks nor whites employed in production jobs at the plant were qualified to fill craft jobs. Yet the preferences established by the affirmative action program extend not to blacks who might have been in the craft hiring pool—and thus who might have been victims of discrimination in craft hiring at Kaiser had such discrimination occurred—but only to blacks already

[2] See USWA Pet. at 5 and n. 5.

[3] See USWA Pet. at 4 and n. 3.

employed at the plant in production jobs who lacked the qualifications to have secured craft jobs prior to the institution of the training program.

The affirmative action program USWA negotiated with Kaiser, and with large segments of American industry as described above, was not designed to remedy discrimination that might, or might not, have occurred at the plants where the program was put into effect. Rather, the program was designed to address a phenomenon which troubled the union throughout its jurisdiction: the virtually complete absence of blacks in craft jobs in industrial plants—an absence which contrasts, in many plants, with the presence of large numbers of blacks in production jobs. The reason for that phenomenon may well differ from plant to plant. The explanation for it at the Gramercy plant, as found by both courts below, is undoubtedly common: the pool of qualified craftsmen in the job market from which the plant could draw was almost exclusively white.

B. The Government suggests in its petition that a purpose of a remand would be to "permit one of the parties or an intervenor to seek to prove prior discrimination against blacks at the Gramercy plant." U.S. Pet. at 19.[4] Both courts below found that Kaiser had not discriminated against blacks in filling craft jobs at the Gramercy plant, and those findings were based on a full record which contains *inter alia:* the numbers of black and white craftsmen; the procedures the company used for filling craft vacancies; and the characteristics of the available pool from which craftsmen at the Gramercy plant were hired.

The Government makes no proffer as to ways in which

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[4] That suggestion appears at odds with the statement earlier in the Government's petition that "it is unduly restrictive to permit the employer and union to adopt an affirmative remedy only if they can establish in court that the employer has been guilty of discrimination." U.S. Pet. at 11.

the record in this case is inadequate, or as to any specific evidence of discrimination which might be introduced, except to speculate that perhaps the same kinds of hiring criteria found to be suspect by the court in *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978) —an opinion involving another Kaiser plant, which expressly recognized that the circumstances at that plant were different from those at the plant involved in *this* case, *id.* at 1390-91, n. 35—could be shown to have been used at the Gramercy plant. Even that speculation is disingenuous. As the record shows, the craft positions at the Gramercy plant required journeyman craft skills; without a training program, the craftsmen hired off the street had to possess those skills; and, in the hiring area of the Gramercy plant, blacks constituted approximately one or two per cent of the pool of qualified journeyman craftsmen. Thus, the obstacle to blacks receiving crafts jobs prior to the institution of the present program was not some arbitrary general intelligence or high school education requirement imposed by Kaiser, as was found to be the case in *Parson,* but the inability of blacks to achieve journeyman skills due to societal discrimination. The only way *that* obstacle could have been removed by Kaiser was to establish, as the plan struck down by the court below does, a training program which teaches those skills over a two or three year period. That program, as the record shows, costs between $15,000 and $20,000 per year per trainee.

These facts were all before the courts below, which found not only that Kaiser had not discriminated against blacks in filling craft vacancies but that over the years Kaiser had made special efforts to attract black craftsmen to the Gramercy plant.[5]

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[5] As we noted in our petition, at 3-4, n. 2, USWA argued below that the record facts permitted a finding that Kaiser had discriminated, but the courts below rejected that claim.

II.

The Government's petition asserts that the remand it seeks "could significantly narrow the question presented in this case." U.S. Pet. at 20. As we showed in Part I, there is no evidence absent from this record which could transform the question presented. But even if such evidence could be found, it would not be accurate to say that the issue would be "narrowed." For what the Government hopes to create by a remand is not a lesser included issue encompassed in the question now presented, but an entirely different issue. The question now presented is whether private parties may *voluntarily* establish programs such as that here. If the Government could reconstruct the case on remand, the issue would become whether Title VII empowers or permits the Government to *impose* such programs upon private parties. Both of the theories the Government wishes to recast this case to present are bottomed on the following premise: the Government has the power to require private parties who have discriminated in the past to employ a quota as a "remedy," even though that quota advantages blacks, solely because of their race, who are not themselves the victims of the discrimination the quota is meant to "remedy."

The Government's first theory proceeds from that premise in the following way: courts may upon finding discrimination in violation of Title VII order quota "remedies"; Title VII favors voluntary compliance; therefore, private parties ought to be able to avoid litigation by voluntarily putting into place the kinds of remedies courts would order —in those instances where the private parties can establish that there was some predicate for a court to act.[6]

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[6] Thus, the Government argues:

"... Faced with possible violations of Title VII, Kaiser could have refused to take corrective action and instead have allocated its resources to defend itself in litigation. Had Kaiser

The Government's second theory builds upon that premise more directly: the Office of Federal Contract Compliance ("OFCC") has the power to require an employer that contracts with the Government to adopt a quota program, and such power does not conflict with Title VII.

Resolution of the issue whether the Government may impose quota remedies upon nonconsenting private parties requires resolution of knotty questions not implicated by the issue which is properly here. The Government's assumption, for example, that once a court in a Title VII case finds discrimination of some sort, it may then award a remedy directed not at making-whole a victim of that discrimination but instead at providing a benefit to a non-victim—because that non-victim is the same race as the actual victim—is by no means obviously correct. What Title VII forbids is discrimination "against any individual." 42 U.S.C. § 2000e-2(a)-(d). That proscription does not lead inevitably to the conclusion that a finding of discrimination against one individual or class of individuals empowers a court to order that a benefit be given to another individual or class of individuals. This Court has indeed twice prescribed, as the appropriate cure for a Title VII violation, that the individual victims of discrimination be put in their "rightful place." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 737 (1976); *Teamsters* v. *United States*, 431 U.S. 342, 362-376 (1977). And all of the opinions in *Franks* suggested that

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chosen that course, and had its defense proved unsuccessful, a court could have imposed the kind of affirmative action program here at issue as a remedy for discrimination, as the court of appeals acknowledged (App. A., *infra*, p. 10a). Even without a finding or admission of discrimination, the same program could have been incorporated into a consent decree in settlement of the litigation, as the court of appeals also acknowledged (*id.* at 16a). Instead, however, the program was instituted voluntarily without the necessity of litigation, contested or uncontested."

U.S. Pet. at 12-13.

where injunctive remedies will subordinate the job rights of competing innocent employees, it is particularly important that such remedies be tailored to righting the wrong that was done *and no more*. This Court has never held that Title VII grants courts authority to award preferential treatment to non-victims. Yet the theories the Government seeks to pursue—but not the issue actually presented by this case—require that such a holding be made.

Moreover, Title VII contains an express prohibition against Government *imposition* of racial preferences to overcome underrepresentation of minorities. Section 703(j) of the Act, 42 U.S.C. § 2000e-2(j). Once a court-ordered "remedy" goes beyond making the victims of a violation whole to giving job preferences to non-victims, it is arguably no longer a remedy but a preference the sole purpose of which is to redress a numerical imbalance. And, the Government concedes in its petition "that . . . Executive Order [11246] cannot override Title VII." U.S. Pet. at 16. Any Government claim, therefore, that the OFCC has the power, pursuant to the Executive Order, to direct employers to grant preferential treatment based upon race to non-victims of discrimination must be measured against the expression in § 703(j) of Congressional hostility to Government imposition of such preferential treatment.

We do not mean to suggest that these considerations are *necessarily* fatal to the Government's theories, but we have noted them to show that the Government's theories implicate a number of difficult subsidiary questions which are not implicated by the question presented on the present record. The issue actually raised by the record in this case requires only discerning Congress' intention with respect to the permissible scope of *voluntary* private affirmative action.

Nor do we mean to suggest that the Government's theories are unimportant; indeed, in an appropriate case, they may well merit this Court's attention. But this case presents an issue which both is analytically distinct from,

and relates to different practical situations than, the Government's issues—one which is ready for decision now, and which merits this Court's immediate attention.

III.

It is of great practical importance that this Court address the question actually decided by the courts below—the question which we have raised in our petition—and not leave that question unresolved as the Government requests. The decision below poses immediate practical problems for USWA and the large segments of American industry with which it deals—as well as for other unions and employers—which have voluntarily established affirmative action programs for reasons other, and upon bases other, than the nice justifications the Government now sets out in its petition. The legality of those programs depends on the answer to the question which USWA has asked this Court to decide: whether, irrespective of the existence of prior discrimination at the plant, Title VII forbids private parties from voluntarily establishing programs like the one here to redress the effects of historic societal discrimination upon their workforce. Without an answer to that question, USWA, the employers with whom it deals, and other employers and unions will not have the guidance they need as to the legality of present affirmative action programs, much less as to whether they may lawfully establish new programs along the same lines.

The remand the Government requests would not only be pointless, as discussed in part I *supra,* the delay it would occasion would have serious harmful consequences to the national interest, as described in our petition at 10-11.[7]

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[7] That American industry shares our view as to the need for immediate resolution is evident from the Brief Amicus Curiae of the Equal Employment Advisory Council In Support Of Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit.

CONCLUSION

The issue which is presented by this case is ready to be decided now. For the reasons stated in USWA's petition, this Court should grant certiorari to decide that issue, and should not summarily remand as the Government requests.

Respectfully submitted,

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and

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Petitioners*

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE GOVERNMENT CONTRACT EMPLOYERS ASSOCIATION AS AMICUS CURIAE

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Supreme Court Rule 42(3), the Government Contract Employers Association (GCEA) moves the Court for leave to participate as *amicus curiae* and file the attached brief

INTEREST OF THE *AMICUS CURIAE*

The Government Contract Employers Association ("GCEA") respectfully submits this brief *amicus curiae* in support of the petitions of Kaiser Aluminum & Chemical Corporation, United Steelworkers of America, the United States of America, and the position of Brian Weber in the alternative, that the Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above entitled case.[1] GCEA respectfully submits that the issue to be decided in this case is whether racial quotas can be imposed not to remedy past discrimination by an employer, or to assist identifiable victims of past discrimination, but rather to achieve a designated ratio of minority employees presumed to have been victims of societal discrimination.

The GCEA is a not-for-profit association of employers doing business nationwide who contract with the government. All GCEA members are subject to Executive Order 11246 (30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14302 (1967), and 43 Fed. Reg. 46501 (1978)). The members of GCEA are each obligated to follow the affirmative action and non-discrimination requirements of Executive Order 11246 as well as Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) (hereafter "Title VII"). The GCEA was formed to assist employers in resolving the tensions caused by the conflict between the regulations promulgated under Executive Order 11246 and the court decisions interpreting Title VII. The principal concern of GCEA is to present the views of its members in examining, implementing, following, and where

[1] The GCEA supports the petition of the United States only to the extent that it urges the granting of the writ of certiorari. It opposes that petition insofar as it requests the Court to remand the case to the district court. If the writ of certiorari is granted, the GCEA will largely support the position of respondent Weber, and assist the Court in resolving the tension between the impermissible quotas under the OFCCP regulations and § 703(j) of Title VII.

necessary, challenging the correctness of regulations, orders, and laws designed to promote equal employment opportunity for all employees.

The GCEA represents a point of view of government contractors that is not being presented to the Court by any other employer association; the members of GCEA will be directly affected by the outcome of the instant case.[2] The decision of the Fifth Circuit below creates serious problems for members of GCEA in complying with the conflicting interpretation and requirements of Title VII and Executive Order 11246. Members of GCEA are placed in the untenable position of attempting to follow the regulations of a government agency which in fact subjects them to private class actions by persons who may have been discriminated against because of this government mandated action.

It is the position of GCEA that the regulations promulgated by OFCCP in fact create quotas which are violative of Title VII and contrary to the Executive Order itself. The fact that a finding of noncompliance is made by the OFCCP without taking into consideration why a numerical imbalance in the workforce is not the result of discrimination is contrary to the standards articulated by the Court in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), *Furnco Construction Company* v. *Waters,* ____U.S.____, 98 S. Ct. 2943 (1978), and *Board of Trustees of Keene State College* v. *Sweeney,* ____ U.S.____, No. 77-1792, decided November 13, 1978.

Because the members of GCEA are subject to the conflicting demands of inconsistent government mandates, the GCEA urges the Court to grant the petitions herein. Review of this

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[2] Any change in the obligations of government contractors could have an adverse effect on their current affirmative action requirements. The GCEA thus will urge that any change in these obligations, and any liability arising therefrom, be prospective only. *City of Los Angeles* v. *Manhart,* ____ U.S. ____, 46 U.S.L.W. 4347 (1978).

case will allow the Court to begin the process of reconciling the regulations of the Department of Labor with Title VII, and to provide guidance to employers concerning the appropriate scope of affirmative action.

STATEMENT OF THE CASE

In February 1974, Kaiser Aluminum & Chemical Corporation ("Kaiser") and the United Steelworkers of America ("USWA") entered into a collective bargaining agreement which created a program for eligibility to receive on-the-job training to enter craft positions at Kaiser's plants. For purposes of the training program a two-tracked seniority list, based upon race, was created. The program provided an entrance ratio of one white to one minority worker until the percentage of minority craft workers roughly approximated the percentage of minority population in the surrounding area of each plant. Eligibility into the program was based on seniority within the respective racial groupings. Kaiser adopted the fifty percent (50%) quota in its training program in part because of its perception of the requirements under Executive Order 11246 as interpreted by the Office of Federal Contract Compliance Programs ("OFCCP").[3] The effect of this system was to admit minority workers into the training program who had less overall seniority than some white applicants.

Brian Weber, an unsuccessful white bidder working at the Gramercy, Louisiana plant brought a class action to challenge the legality of the training program.[4] Weber alleged that by preferring black employees with less seniority for admission to the program, Kaiser and USWA violated Title VII.[5]

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[3] Opinion of the Court of Appeals, 563 F.2d 216, 218 (5th Cir. 1977). Judge Wisdom dissented from the decision. The opinion of the district court is reported at 415 F. Supp. 761 (E.D. La. 1976).

[4] 415 F.Supp. at 763.

[5] Civil Rights Act of 1964, §§701 *et seq.*, 42 U.S.C. §§2000e *et seq.*

The district court found that the program was not instituted to correct any past discrimination by Kaiser.[6] Because Kaiser did not discriminate in filling its craft positions in the past, the court held that the two-track training program was unlawful discrimination under Title VII. The court rejected the assertion that the racial quotas were a legitimate response to societal discrimination. Moreover, no one contended, and the district court found that none of the minority workers preferred over the more senior white workers was ever a victim of discrimination at the Gramercy plant.[7]

The majority of the Fifth Circuit Court of Appeals affirmed the district court. It found that "[in] the absence of prior discrimination a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial preference prohibited by Title VII, § 703(a) and (d)."[8]

With regard to the defense that Executive Order 11246 required the implementation of the race-based selection procedure, the court found "if Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser in the absence of any prior hiring or promotion discrimination the Executive Order must fall before this direct congressional prohibition."[9]

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions Concerning The Permissible Scope of Voluntarily Instituted Racial Quotas In The Employment Area Which Remain Unresolved Under The Court's Decision In *Bakke*.

The *Weber* case squarely presents the problems relating to the legality of the use of racial preferences in order to remedy past societal discrimination. In the instant case, the Fifth

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[6] 415 F.Supp. at 765.

[7] *Id* at 764.

[8] 563 F.2d at 224.

[9] *Id.* at 227.

Circuit found that any voluntary compliance with Executive Order 11246 which includes race-conscious selection procedures violates Title VII, unless employers or others are prepared to establish that the employer engaged in past discriminatory acts. The recent decision of this Court in *Regents of the University of California* v. *Bakke,*[10] (hereafter *"Bakke"*) answered some of these questions in the context of univeristy admissions. It did not answer these questions in the employment area.

The impact of *Bakke* in employment is speculative at best for two reasons. First, the ambiguity of legislative intent under Title VI which four members of the Court in *Bakke* found sufficient to allow for remedial action to correct societal discrimination in that case is not present under Title VII. Second, the compelling state interest which Mr. Justice Powell found in *Bakke* is not present in the employment area where there is no state action, and thus the constraints of the Fourteenth Amendment are not present. *Weber* is the paradigm case to resolve these issues in employment which are left unanswered by *Bakke.*

A. The Ambiguity Of Legislative Intent Under Title VI Is Not Present Under Title VII.

In *Bakke,* an unsuccessful white applicant challenged the special admissions program of the University of California at Davis, which was designed to assure the admission of a specified number of students from certain minority groups. The Court held that state university admissions policies which are based on fixed racial quotas are illegal.

Two major issues were decided in *Bakke.* First, membership in a racial or ethnic minority does not constitutionally justify preferential treatment by the state or federal government. Second, race can be considered as one factor in giving preferential treatment if the reason for the consideration is constitutionally justifiable.[11]

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[10] ____ U.S. ____, 98 S.Ct. 2733 (1978).

[11] Kurland, *Bakke's Wake,* 60 Chi. B. Rec. 66, 82 (1978).

The opinion of Justices Brennan, White, Marshall and Blackmun found that the school's exclusion of whites from consideration for a certain number of positions in order to rectify societal discrimination against minorities was lawful.[12] The opinion by Mr. Justice Stevens, joined by Justices Stewart, Rehnquist and Chief Justice Burger, found that any use of racial classification is strictly forbidden by the language of Title VI.[13] Mr. Justice Powell agreed with the Stevens' position that any classification based on race is subject to strict judicial scrutiny. He found that the strict scrutiny test could be met by the state's compelling interest in protecting the university's First Amendment right to establish a diverse student body. Since the university did not use the least restrictive means in satisfying this interest, however, Justice Powell found the admissions program unconstitutional.[14] Justices Brennan, White, Marshall and Blackmun decided the issues presented in *Bakke* under the statutory provisions of Title VI. *Bakke* did not answer the question of whether race-conscious considerations and quotas are appropriate under Title VII.

A majority of the Court found that Title VI is to be equated with the Fourteenth Amendment. "We agree with Mr. Justice Powell that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself."[15] This judgment was supported in large part on the absence of

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[12] 98 S. Ct. at 2766.

[13] The substantive nondiscrimination provisions of Title VI are virtually identical to those of Title VII: No person in the United States shall on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. § 2000d *et seq.*

[14] 98 S.Ct. at 2764.

[15] 98 S.Ct. at 2767, (Opinion of Justices Brennan, White, Marshall and Blackmun).

legislative history under Title VI which would prohibit preferential treatment of minorities in order to rectify past societal discrimination. This reasoning is inapposite when applied to Title VII because both the language and legislative history of Title VII forbid preferential treatment for any racial group.

During the course of the debates in enacting Title VII, grave concerns were raised that the Act, as proposed, would require employers to disadvantage whites in order to comply with the Title.[16] This objection was met by proponents of the Act, with the contention that no such treatment was intended. "[An employer] would not be obliged—or indeed, permitted—to fire whites in order to hire negroes, or to prefer negroes for future vacancies, or once negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier."[17] Despite these assurances, doubts as to the Act's intent persisted. Section 703(j) was inserted in the Act to alleviate these fears:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . labor organization, or joint labor management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of their race, . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . in comparison with the total number or percentage of persons of such race, . . . in any community, state, section or other area, or in the available work force in any community, state, section, or other area.

42 U.S.C. § 2000e-2(j).

Senator Humphrey, one of the bill's drafters, commented on the purpose of § 703(j) as follows:

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[16] *See eg.*, 110 Cong. Rec. 9881 (1964).

[17] 110 Cong. Rec. 7213 (1964).

> A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his workforce by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly.

110 Cong. Rec. 12723 (1964).

Although § 703(j) is phrased so that an employer is not *required* to racially balance his workforce, the prohibition on a *voluntary* balance is equally applicable, at least insofar as such balancing will injure identifiable non-minority workers. In *McDonald* v. *Santa Fe Trail Transportation Company,* 427 U.S. 273 (1976), the Court made it clear that the protection of Title VII extends to whites on the same basis as minorities. Therefore, it is incongruous to read § 703(j) to allow voluntary racial preferences when to do so will give rise to a cause of action to an injured white worker under §§ 703(a)-(d).

Justices Brennan, White, Marshall and Blackmun found the legislative history of Title VI silent as to the propriety of remedying past societal discrimination under that provision. No such inference can be made under Title VII. The language of the Act, and the legislative history make it clear that preferential treatment for minorities in employment is strictly forbidden.

B. The Compelling State Interest Found In Bakke Is Absent in Weber.

In reaching the constitutional question in *Bakke,* Mr. Justice Powell found that the requirements of the Fourteenth Amendment mandated that any use of racial classifications is suspect and can only be overcome by a compelling state interest. The compelling interest which Mr. Justice Powell found in *Bakke* is the university's First Amendment right to

establish a diverse student body. No comparable right exists in the employment area. Kaiser, in its Petition for Certiorari, attempts to find compelling interests in two areas:

> (1) an interest in action "to ensure against" discrimination which is no less substantial than in remedying past discrimination and (2) an interest in action "to assure utilization of all segments of society and the available labor pool" comparable to the public school's interest in a diverse student body.[18]

At present, no compelling interest comparable to those enumerated above has been recognized by the Court. Whether such interests are indeed compelling and sufficient to satisfy the use of outright racial quotas in the employment context are issues which are vitally important to American industry and must be resolved by the Court.

Unlike *Bakke,* the present case presents no issue of state action. Rather, this case involves action taken by purely private parties not subject to any constitutional proscription against discrimination. The question thus presented is purely one of statutory interpretation. If however, the Court should find, in the context of this case, that Title VII must have the same meaning as the Fourteenth Amendment, a definition of the interests which can overcome strict judicial scrutiny for racial classifications is imperative.[19]

The *Weber* case affords the Court the opportunity to define the role of racial preferences in employment, for this case squarely presents important questions which are unresolved under *Bakke.*

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[18] Petition for Writ of Certiorari by Kaiser, No. 78-435 at 11.

[19] *Bakke* also left open the question of the propriety of instituting racial quotas in the absence of any finding of past discrimination. The opinion of Mr. Justice Powell frequently contrasted the factors in the *Bakke* case to those cases under Title VII where quotas were imposed to remedy specific findings of discrimination. However, no guidelines

(Footnote continued on following page.)

II. This Case Presents To The Court The Opportunity To Resolve The Conflicting Demands Placed Upon Industry In Conforming Its Equal Employment Opportunity Responsibilities Under Title VII And Executive Order 11246.

A decision in the instant case is necessary to reconcile government contractors' attempts to engage in "affirmative action" as required by Executive Order 11246, yet comply with the prohibitions of Title VII that no person shall be discriminated against in employment on the basis of race, sex, religion, or national origin. As the Executive Order is currently being interpreted by OFCCP, an employer must either choose to violate Title VII or forego government contracts. This case provides the Court the unique opportunity to define a unified national equal employment policy by reconciling the express congressional intent in Title VII to ban discrimination in employment with the executive policy of promoting affirmative action under Executive Order 11246.[20]

(Footnote continued from preceding page.)

were given regarding the use of such measures when no discrimination has been found, and the result of the voluntary quotas is to deprive white workers of employment opportunities in favor of minorities who have not been found to be victims of any past discrimination.

The propriety of the use of racial quotas to remedy specific findings of past discrimination has been assumed by the courts of appeal. *See e.g., United States* v. *International Union of Elevator Constructors, Local 5,* 538 F.2d 1012 (3d Cir. 1976); *EEOC* v. *Local 638,* 532 F.2d 821 (2d Cir. 1976); *NAACP v. Allen,* 493 F.2d 614 (5th Cir. 1974). The Supreme Court has never approved of such preferential treatment in the absence of such a finding.

[20] Executive Order 11246 is not facially contradictory with Title VII, rather the regulations promulgated thereunder create the conflict. See discussion, *infra.*

A. The Regulations Promulgated Under Executive Order 11246 Contravene The Express Prohibitions On Employment Discrimination Under Title VII.

The conflicting demands in Title VII and the regulations promulgated under Executive Order 11246 have placed government contractors in a quandary. On the one hand, Title VII flatly prohibits discrimination against any person because of his or her race. On the other hand, the regulations of the OFCCP, issued pursuant to Executive Order 11246 mandate that racial preferences be given to minorities regardless of any discrimination against them and despite its adverse effect upon non-minority workers.

1. The Compliance Requirements Under Executive Order 11246 Oblige Federal Contractors To Establish Racial Quotas.

The compliance requirements of OFCCP regulations under Executive Order 11246 oblige federal contractors to implement racial quotas in the guise of "goals and timetables" in order to maintain their government contracts. Indeed the court of appeals in the present case found that the one minority for one white entrant to the Kaiser craft training program was instituted to comply with the threats of the OFCCP conditioning federal contracts on appropriate affirmative action.[21] The court also correctly found that "attempts to distinguish a numerical goal from a quota have proved illusory and most such goals suggested by the OFCC can fairly be characterized as quotas." 563 F.2d at 222.

The soundness of the court's position is demonstrated by the compliance requirements of OFCCP. The regulations promulgated by the OFCCP require a federal contractor to

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[21] Since the action undertaken by Kaiser and other government contractors such as the members of GCEA was predicated on regulations issued pursuant to Executive Order 11246, any relief which is granted should be prospective only. *City of Los Angeles* v. *Manhart*, ____ U.S. ____, 46 U.S.L.W. 4347 (1978).

make a written work force analysis and develop a written affirmative action compliance program for each establishment.[22] If this utilization analysis shows that a particular employer has "underutilizations" of available minorities or women, (an "affected class"), it must develop "goals and timetables" to overcome the underutilization in the particular work group.[23] The statistical imbalances that trigger affirmative action goals and timetable requirements are not dependent upon a showing of past or present discrimination.[24] Nor does the establishment of the quota aid any identified victim of past discrimination. Yet, without any showing of past discrimination whatsoever, a federal contractor who fails to comply with the above OFCCP regulations faces the sanctions of the cancellation or termination of all federal contracts, the withholding of progress payments on a particular contract, or debarment from all future federal contracts prior to a hearing.[25] By requiring employers to adopt affirmative action programs on the basis of numerical imbalance alone, without regard to the cause of such imbalance, and then by threatening to cut off federal contracts if the imbalance is not corrected, the OFCCP has turned "goals and timetables" into quotas.[26]

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[22] Revised Order Number 4, 41 C.F.R. Part 60-2.

[23] 41 C.F.R. §§ 60-2.10, 60-2.12.

[24] Hearings on § 2115, etc., before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92nd Congress, 1st Session, 77, 88 (1971).

[25] 41 C.F.R. § 60-1.26; 41 C.F.R. § 60-2.2(b); 41 C.F.R. § 60-30. *See Crown Zellerbach Corp.* v. *Marshall,* 15 FEP Cases 1628 (E.D. La 1977); *Illinois Tool Works* v. *Marshall,* 17 FEP Cases 520 (N.D. Ill. 1978), as illustrative of the government's widespread practice of imposing the above sanctions prior to a hearing.

[26] The OFCCP's requirement that an employer establish goals and timetables without being afforded an opportunity to demonstrate that any imbalance existing in his workforce is not the result of acts of discrimination is inconsistent with the Court's decisions in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), *Furnco Construction Company* v. *Waters* ____ U.S. ____, 98 S. Ct. 2943 (1978), and *Board of Trustees of Keene State College* v. *Sweeney,* ____U.S.____, No. 77-1792, decided November 13, 1978.

The rigidity of the government's position that goals and timetables equal quotas is demonstrated by its position in support of District Judge Alfonso J. Zirpoli's order in *Legal Aid Society of Alameda County* v. *Brennan,* 381 F. Supp. 125 (N.D. Cal. 1974).[27] There the court directed that annual hiring and promotion rates, stated as percentages, *must* be equal to the percentage of minorities available in the relevant labor market. Although *Alameda* is currently on appeal by the intervenor, Chamber of Commerce of the United States of America, the government having withdrawn its appeal, continues to use Judge Zirpoli's decision to effect enforcement of quotas. *See eg., Crown Zellerbach Corp.* v. *Marshall,* 15 FEP Cases 1628 (E.D. La. 1977).

2. The Establishment of Racial Quotas Is Violative of Title VII and Requires Inconsistent Behavior By Employers.

The preferential treatment accorded minorities pursuant to the labor agreement between Kaiser and the union, based upon preceived OFCCP requirements, is clearly contrary to the congressional intent underlying adoption of Title VII.[28] The blatant inconsistencies between demands under Title VII and Executive Order 11246 are evidenced by the following statement of the floor managers of the bill during the debates in the United States Senate in enacting Title VII:

> There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate intent to maintain a racial balance, whatever such balance may be, would

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[27] In *Alameda* the court mandated the OFFCP to follow "Technical Guidance Memo No. 1 on Revised Order No. 4", which was intended to be a guide in determining when the failure to meet a goal constitutes a violation of the contractor's obligations.

[28] Note, *Title VII and Preferential Treatment: The Compliance Dilemma,* 7 Texas Tech Law Review 671, 673 (1976).

> involve a violation of Title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race.[29]

The Congressional intent in enacting Title VII was to protect all individuals.[30] That the Act's protection extends to all persons regardless of race, was confirmed by the Court in *McDonald* v. *Santa Fe Trail Transportation Company,* 427 U.S. 273 (1976).

Employers receiving government contracts who resist pressures to implement numerical goals or quotas in order to comply with Title VII invite discrimination suits and will either have to bear the expense of defense or the stigma and expense of an admission of discrimination. In many cases employers face a massive, if not insurmountable, burden to justify their selection practices if they are seen as barriers to employment of minorities, even though there is no basis for questioning their good faith. Moreover, such reluctance subjects employers to sanctions under Executive Order 11246 including debarment from all future federal contracts. As the court of appeals correctly found, the establishment of a racial quota under the auspices of Executive Order 11246 creates reverse discrimination and is flatly prohibited by Title VII.

Yet, if employers disregard the clear mandate of Title VII and implement goals or quotas, as in the present case, they are faced with claims of "reverse discrimination" and are equally subject to the burdens of back pay and other government sanctions.

Meaningful affirmative action can be accomplished without usurping the rights of non-minority workers and

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[29] Interpretive memorandum of Title VII of HR 7152 submitted jointly by Senators Clark and Case, floor managers, 119 Congressional Record 7212, 7213 (1964).

[30] Remarks of Rep. Seller, 110 Congressional Record 2579 (1964).

running afoul of Title VII. Although the Executive Order requires affirmative action, it does not require quotas. Indeed, a requirement of racial quotas to correct an imbalance in a work force imposes an unreasonable burden on the employer and upon qualified majority workers who are denied employment benefits because they are not members of a racial minority. It also contributes to racial tensions. As Judge Wisdom in the present case pointed out:

> The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal actions. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay. (citations omitted).[31]

The resolution of the conflict between Title VII and the regulations promulgated under Executive Order 11246 is imperative to implement the Congressional mandate for a unified national policy of equal employment opportunity.

B. The Request By The Government For Remand Is An Attempt To Avoid The Resolution Of The Conflict Between Title VII And The Regulations Promulgated Under Executive Order 11246.

The interpretation by the government of Executive Order 11246 is in direct conflict with Title VII. Yet the government in its Petition for Certiorari is asking the Court to avoid this issue and instead remand to the district court to determine among other things, if the "facts with respect to the craft jobs at the Gramercy plant could have supported a *prima facie* finding of discrimination by the employer or the union and employer

[31] 563 F.2d at 230 (dissenting opinion).

Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser in the absence of any prior hiring or promotion discrimination the Executive Order must fall before this direct congressional prohibition". 563 F.2d at 227. In so holding, it is clear that the court of appeals would require a finding of discrimination by an employer before racial quotas can be instituted. The correctness of this position is evident in that no remedy can be imposed in the absence of a violation. Yet the decision of the Fifth Circuit is in conflict with the decisions of *Associated General Contractors of Massachusetts, Inc.* v. *Atlschuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied* 416 U.S. 957 (1974), *Southern Illinois Builders Associations* v. *Ogilvie,* 471 F.2d 680 (7th Cir. 1972), and *Contractors Association of Eastern Pennsylvania* v. *Schultz,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971). In the First, Third, and Seventh Circuits an employer need not be found to have discriminated before racial quotas can be imposed. This conflict between the circuits on the appropriate scope of racial quotas absent a finding of discrimination by an employer must be resolved.

Moreover, there is conflict within the circuits concerning the breadth of a remedy which includes race conscious selection procedures. The Fifth Circuit below found that remedial quotas can be imposed only to aid identifiable victims of discrimination.[36] In the Third Circuit, racial quotas as remedies can be imposed to benefit classes of persons.[37] The resolution of the conflicts between the Fifth Circuit Court of Appeals and other courts of appeal is necessary in order to allow for uniform employment practices by companies, like Kaiser and members of GCEA, which operate nationwide.

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[36] 563 F.2d at 225.

[37] *EEOC* v. *AT&T,* 556 F.2d 167 (3d Cir. 1977), *cert. denied,* 46 J.S.L.W. 3803 (1978).

together."[32] This is a blatant attempt by the government to avoid the illegal consequences of its interpretation of Executive Order 11246.[33]

The government had ample opportunity to establish its position in the courts below. It should not be allowed at this stage to overturn the findings of both the district court and the court of appeals that no past discrimination existed at the Gramercy plant of Kaiser. The "two-court" rule of the Court established in *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271 (1949), forbids a reconsideration of concurrent factual determination "by two courts below in the absence of a very obvious and exceptional showing of error".[34] The record is clear that no such error exists in the present case.

The issue before the Court is purely a legal question. Can racial quotas be imposed, not to remedy past discrimination by an employer, or to assist identifiable victims of past discrimination, but rather to achieve a designated ratio of minority employees presumed to have been disadvantaged, at the expense of innocent white workers? The thinly-veiled attempt by the government to avoid the resolution of this question by asking for remand should be denied.

III. The Conflict Within The Circuit Courts of Appeals Requires The Resolution of The Issue Presented.

The Fifth Circuit Court of Appeals in the present case properly found that attempts to distinguish numerical goals from quotas are illusory.[35] It went on to hold that "if Executive

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[32] Petition for a Writ of Certiorari of the Government, No. 78-436 at 14.

[33] See Brief of Respondent in Opposition for a Writ of Certiorari.

[34] 336 U.S. at 275.

[35] 563 F.2d at 222.

CONCLUSION

The dilemma facing government contractors under the current state of equal employment opportunity law is critical. Employers cannot simultaneously comply with Title VII and the regulations promulgated under Executive Order 11246. Whichever path an employer chooses he is left with potential liability to minorities, non-minorities and/or government agencies. This is an untenable position and the resolution of this conflict by the Court is essential.

For the reasons stated above the Government Contract Employers Association respectfully urges the Court to grant the petitions herein and issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfullly submitted,

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November, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-435

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,

v.

BRIAN F. WEBER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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KAISER ALUMINUM & CHEMICAL CORPORATION,
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v.

BRIAN F. WEBER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Kaiser Aluminum & Chemical Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 563 F.2d 216 (1977); the denial of the petition for rehearing and petition for rehearing en banc (Appendix B) is reported at 571 F.2d 337 (1978). The opinion of the United States District Court for the Eastern District of Louisiana (Appendix C) is reported at 415 F. Supp. 761 (1976).

JURISDICTION

The judgment of the Court of Appeals was entered on November 17, 1977 (Appendix H). A petition for rehearing and a petition for rehearing en banc were denied on April 17, 1978 (Appendix B). A timely application for an extension of time to file this petition was granted up to and including September 14, 1978 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May an employer and a union lawfully consider race in the selection of employees for participation in a new craft training program established in part to remedy the past exclusion of minorities from craft employment?

STATUTORY PROVISIONS INVOLVED

Sections 703(a), 703(d), 703(h), and 703(j) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e; Executive Order 11246, 3 C.F.R. § 339 (1964-1965 Compilation), *reprinted in,* 42 U.S.C. § 2000e at p. 281 (1970); and Revised Order No. 4, 41 C.F.R. § 60-2 (1977) are set out in Appendices E, F and G, respectively.

STATEMENT OF THE CASE

Kaiser Aluminum & Chemical Corporation is a government contractor, subject to the affirmative action requirements of Executive Order 11246, as set forth in Revised Order of No. 4, 41 C.F.R. § 60-2. Employees at its Gramercy, Louisiana, plant represented by the United Steelworkers of America, AFL-CIO, include

both unskilled workers and experienced, skilled craft workers.

The area workforce in Gramercy was about 39 percent black when this case was tried in 1975. The total Kaiser workforce was 14.8 percent black at the time, up from 10 percent in 1969 when under pressure from its contract compliance agency, the company began hiring unskilled workers on a one-to-one black to white ratio. Despite this effort, prior to 1974, only five out of 290 craft workers at the Gramercy Plant—i.e., 1.7 percent—were black. A significant factor in the near absence of minorities from the crafts was Kaiser's requirement that applicants have prior experience in the crafts. Because blacks had long been excluded from the craft unions, few were able to present such credentials.

Kaiser was pressed by its contract compliance agency to alleviate this situation and to take steps to assure minority representation in the crafts. At the same time, the Steelworkers were engaged in negotiating a resolution to this and other charges of race and sex discrimination in the steel industry. The results of those negotiations were embodied in the consent decree approved in *United States* v. *Allegheny-Ludlum Industries, Inc.*[1]

As a result, in 1974, the company and the union entered into an agreement creating a new craft training program at each of 15 plants. Under this new program, incumbent employees—white as well as minority—who did not have experience in craft work were afforded an opportunity for the first time to train for craft jobs. As in the craft training program approved

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[1] 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

in the Steel Consent Decree, minority and white employees were to share equally in the trainee vacancies, based on relative seniority within each racial group until underutilization of minorities was eliminated. In the first year of the program at Kaiser's Gramercy plant, six white and seven black employees were admitted to the training program. No black employees would have been included among the trainees if selections had been made exclusively on the basis of seniority without regard to race.

Respondent, Brian Weber, was one of the white employees who sought admission to the new trainee program in 1974. He was not selected while less senior minority employees were chosen.[2] His complaint followed alleging that he had been discriminated against because of his race in admission to a training program in violation of §§ 703(a), (d) and (j) of Title VII of the Civil Rights Act of 1964, as amended.

The company, in response, pointed to its affirmative action obligations as a federal contractor under Executive Order 11246. Although the company denied any prior acts of discrimination, it did not offer a detailed justification for the disproportionately small share of its production and craft workforce held by minorities.[3] Moreover, the company witnesses conceded

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[2] If the sole prerequisite for selection into the training programs had been plant seniority, Weber would not have been a selectee. Between 35 and 40 employees bidding on the three jobs on which Weber bid had more seniority. Trial transcript at p. 94; Fifth Circuit Appendix at p. 139.

[3] A witness for Kaiser testified that in the past the company had selected the applicants whom it considered best qualified for production jobs and that it had actively sought experienced minority craftsmen in recent years. Trial transcript at pp. 55, 85; Fifth Circuit Appendix at pp. 99, 129.

that Kaiser knew that its requirement for prior experience for craft applicants had a disparate impact on blacks because of their former exclusion from craft unions. This requirement was explained in terms of cost savings to the company.

The District Court decided in Weber's favor on two grounds. First, it held that Title VII prevents employers and unions from voluntarily adopting employment selection quotas based on race even if a court would be empowered to impose them in a litigated case or in a consent decree. Second, it accepted Kaiser's denial of discrimination and declared that even a court would not be authorized by Title VII to impose racial quotas in the absence of a finding of discrimination against the company. The District Court also concluded that the company's obligations under the Executive Order must be subordinated to the specific requirements of Title VII.

Although the Court of Appeals rejected the District Court's holding that the scope of voluntary remedial action was more limited than that which a court could approve or impose, it held that in the absence of evidence to support a finding of prior discrimination by the company neither Title VII nor Executive Order 11246 would support the race-based selection system which Kaiser and the Steelworkers had instituted.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Holding That a Race-Based Selection System Is Lawful Only to the Extent It Remedies Prior Discrimination by the Employer Involves Issues Raised But Not Resolved by This Court's Decision in *Bakke* and Which Urgently Need Resolution by This Court

The Fifth Circuit held in this case that "[i]f Executive Order 11246 mandates a racial quota for admission to on the job training by Kaiser, *in the absence of any prior hiring or promotion discrimination,* the executive order must fall . . . ."[4] Thus, according to the Fifth Circuit, any voluntary compliance with Executive Order 11246 which includes race-conscious selection procedures violates Title VII unless the employer or others are prepared to establish that the employer engaged in past discriminatory acts.

As Judge Wisdom recognized in dissent, this is the "wrong standard" and will put an end to voluntary compliance with the affirmative action mandates of both Title VII and Executive Order 11246.

> The employer and the Union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action. If the privately imposed remedy is either excessive or inadequate, the defendants are liable.[5]

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[4] 563 F.2d at 227.

[5] 563 F.2d at 230. The accuracy of this comment can be seen by comparing the decision below with a subsequent decision of the Fifth Circuit in which the Court held that a prima facie case of discrimination in entry to the crafts at another Kaiser plant was

In *Regents of the University of California* v. *Bakke*,[6] this Court grappled with racial preferences in the admission system of a state and federally supported medical school. A majority of the Court held that race could be a factor in selecting students for admission. However, only four Justices supported the school's exclusion of whites from consideration for a certain number of positions in order to rectify societal discrimination against minorities. Another group of four Justices declared that Title VI of the Civil Rights Act of 1964 prohibits any exclusion from programs which are federally funded regardless of whether or not such exclusion carries with it a racial stigma. Mr. Justice Powell agreed with this latter group that a racial classification cannot be justified simply because its purposes may be benign or simply to promote ethnic diversity. However, his ultimate determination that the medical school's admission system was not justifiable was based on his conclusion that the selection system was unnecessary to the accomplishment of any compelling public interest.[7]

In the course of his opinion, Mr. Justice Powell frequently contrasted the factors in the *Bakke* case with those involved in numerous employment discrimina-

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presented by evidence of underutilization of minorities and a prior industrial experience requirement. Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1381-82 (5th Cir. 1978).

[6] 98 S.Ct. 2733 (1978).

[7] Essentially, Mr. Justice Powell concluded that the admissions system could not be justified as remedying "identified discrimination" or as improving the delivery of health care services to communities currently under served, and that the school's interest in attaining a diverse student body could be met effectively by favorably considering race and ethnic background in a selection process in which all applicants compete for all positions.

tion cases where quota remedies were approved.[8] However, those references leave open questions regarding the appropriate use of racial preferences in employment under Title VII and Executive Order 11246.

Many of these questions can and need to be resolved in this case. Racial preferences are an indispensable means of ending the exclusion of minorities from many occupational categories such as the industrial apprentice and craft jobs at issue here. More subtle attempts to "consider" race or ethnic origin are ill suited and ineffective in situations where little or no room is left for management discretion and vacancies are regularly awarded to the most senior or experienced candidate.[9] In such situations, unless preferences are allowed, sig-

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[8] In the context of Title VII litigation, Mr. Justice Powell noted the existence of

> legislative determinations wholly absent here that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination.

98 S.Ct. at 2758 n. 44. Mr. Justice Powell also pointed out that Title VII remedies flow not only from a discovery of disparate impact but also from the absence of any showing that the practice causing that impact was job related. In contrast, he found nothing in the *Bakke* record that

> even remotely suggests that the disparate impact of the general admissions program at the Davis Medical School . . . is without educational justification.

Id. And unlike the cases which involved racial preference in employment prescribed or agreed to by competent administrative agencies, Mr. Justice Powell concluded that the medical school in *Bakke* neither purported to nor was in a position to establish that the racial classification it had adopted was responsive to identified discrimination. *Id.* at 2754-55, 2758.

[9] Such seniority systems, if bona fide, are not made unlawful by their perpetuation of past discrimination or underutilization. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); United States v. East Texas Motor Freight System, Inc., 564 F.2d 179 (5th Cir. 1977). However, this does not mean

nificant change will only occur as new minority employees slowly attain sufficient seniority or experience to preempt vacancies for themselves.

Moreover, the judicial and administrative resources available to direct the application of Title VII and Executive Order 11246 are limited and both laws emphasize voluntary compliance. It is simply not feasible to have governmental bodies make specific findings of past discrimination and to prescribe the precise remedial action to be undertaken by each employer or group of local contractors.

Regulations issued under Executive Order 11246 declare that Kaiser and other government contractors are required to develop and implement an acceptable affirmative action program.[10] Such a program

> must include an analysis of areas within which the contractor is deficient in the utilization of mi-

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that such systems are not subject to change where necessary for affirmative action purposes, EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3803 (1978) or by the parties for other lawful reasons. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

[10] Pursuant to Section 202 of the Executive Order, government contractors are not only prohibited from discriminating on the basis of race, color, religion, sex or national origin in their employment practices but they are also obligated to take affirmative action to ensure against such discrimination. The disclaimer in Section 703(j) that Title VII does not require racial preferences to correct imbalances in an employer's work force has been held not to apply to the affirmative action obligations of Executive Order 11246. Contractors Association of Eastern Pennsylvania v. Schultz, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977); *cert. denied*, 46 U.S.L.W. 3780 (1978). During the 1972 amendments to Title VII, a proposal to make Section 703(j) applicable to the Executive Order as well as Title VII was defeated. 118 Cong. Rec. 1676 (1972); *see also*, 563 F.2d at 238.

> nority groups and women and further, goals and timetables . . . to achieve prompt and full utilization of minorities and women, at all levels and in all segments of his work force . . . .

41 CFR § 60-2.10. Those regulations further state that the Government has concluded that skilled craft work is one of the categories in which minority groups are most likely to be underutilized and that each contractor shall direct special attention to craft jobs in his analysis and goal setting.[11]

The record in this case abundantly reflects Kaiser's attempts to comply with those regulations. It also demonstrates the lack of any practical means of compliance other than the racial classification which it adopted for selecting new craft trainees.[12]

In view of the substantial liabilities and other costs which can flow from employment discrimination, it is difficult to imagine a greater deterrent to affirmative action than the Fifth Circuit's insistence in this case on evidence of discrimination by Kaiser. After agreeing to forego hiring experienced craftsmen and to incur the cost of training inexperienced employees, Kai-

[11] 41 CFR § 60-2-11. Section 60-2.12 *et seq.* of those regulations sets forth the criteria contractors are to apply in developing their goals and timetables.

[12] Kaiser could not find experienced minority craftsmen in significant numbers. Trial transcript at pp. 54-56, 98-99; Fifth Circuit Appendix at pp. 98-100, 142-43. During negotiations, the union would not abandon its consistent prior position that current employees be preferred over inexperienced new hires for these sought after craft jobs. Trial transcript at p. 108; Fifth Circuit Appendix at p. 152. Selecting craft trainees from among current employees on the basis of seniority would produce relatively few minority trainees because of the company's disproportionately low selection of minorities. Trial transcript at pp. 68-69, 92; Fifth Circuit Appendix at pp. 112-13, 136.

ser responded to the challenge to its selection program with testimony about its prior underutilization of black craftsmen and production workers. Its witnesses explained the qualification standards it had used for hiring production workers in only the most general terms [13] and simply denied that its actions were discriminatory. Few, if any, employers can be expected to risk more in the name of equal employment opportunity. None should be expected to confess to past discrimination in order to justify a challenged racial preference.

We respectfully submit that consistent with the views of a majority of this Court in *Bakke,* the racial classification agreed to by Kaiser and the Steelworkers can be justified as an essential means of effectuating either or both of two compelling and administratively determined interests: (1) an interest in action "to ensure against" discrimination [14] which is no less substantial than that in remedying past discrimination and (2) an interest in action to "assure utilization of all segments of society and the available labor pool" [15] comparable to the public school's interest in a diverse student body. If more is required to justify the racial classifications needed to provide meaningful employ-

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[13] This Court has observed that " 'affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systemic exclusion.' Alexander v. Louisiana, 405 U.S. 625, 632." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 342 n. 24 (1977).

[14] While the objective of ensuring against discrimination is stated in Section 202 of Executive Order 11246 as requiring affirmative action by employers, Title VII has a similar "prophylactic" objective. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

[15] EEOC v. AT&T, 556 F.2d 167 (3d Cir. 1977), *cert. denied,* 46 U.S.L.W. 3803 (1978).

ment opportunities to minorities than that which is present in the record in this case,[16] then both government agencies and private groups should have the direction which only this Court can supply.

II. The Court of Appeals' Holding Conflicts With the Decisions of Several Other Courts of Appeals

In this case, the Fifth Circuit affirmed the District Court's holding that:

> Courts would not mandate a preferential quota system in these circumstances where the preferred workers were not identifiable victims of unlawful hiring discrimination and where in fact there had been no past discrimination by the employer.

563 F.2d at 223. The Court of Appeals, therefore, rested its ultimate conclusion that the selection system adopted by Kaiser and the Steelworkers was unlawful upon two related holdings: (1) A race-conscious selection system violates Title VII unless the preferred workers are identifiable victims of unlawful discriminatory practices; (2) a race-conscious employment selection system violates Title VII absent an admission or facts to support a finding of past discriminatory employment practices on the part of the employer.[17] Both holdings place the Fifth Circuit in substantial conflict with a number of other Courts of Appeals.

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[16] It may be suggested that this case should be remanded in order to allow the record to be supplemented. The company considers the record adequate to resolve the issues it has raised in this petition, but does not object to such a remand.

[17] In denying rehearing, the Fifth Circuit appears to have taken the position that remedial action either must be limited to individual victims of past discrimination or past discrimination must be established against the employer. 571 F.2d at 337 n. 1.

Sound administration of justice would require the resolution of conflicts among the circuits on such basic matters, even if the parties involved were only subject to the jurisdiction of one of the Courts of Appeals involved in these conflicts. However, there is an added reason for resolving the conflicts in this case, because the agreement between Kaiser and the Steelworkers which has been challenged here is national in scope.

A. The Fifth Circuit's Holding That a Racial Preference is Forbidden Unless it is Enacted to Restore Employees to Their Rightful Places Conflicts with the Decisions of Other Courts of Appeals

In rejecting the selection ratio adopted by Kaiser and the union to implement the craft training program, the Court of Appeals asserted that racial preferences are lawful only for the benefit of victims of employment discrimination. "[U]nless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII," the court wrote. 563 F.2d at 225. Further, "a minority worker who has been kept from his rightful place by discriminatory hiring practices may be entitled to preferential treatment . . . 'because and *only to the extent that he has been discriminated against.*'" *Id.* at 224-25. (Emphasis added). Both of these statements and others misconstrue the concept of class relief endorsed by this Court under Title VII and by several other Courts of Appeals dealing with class preferences adopted pursuant to Executive Order 11246.

It is true, of course, that Title VII authorizes courts to provide "make-whole" relief to individuals to com-

pensate them for past discrimination. But Title VII does not preclude class relief. To the contrary, this Court has recognized that another, indeed foremost objective of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor . . . white employees over other employees." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-30 (1971). Thus there are, in Mr. Justice Powell's words, "two distinct congressional purposes implicit in Title VII." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 783 (1976) (concurring).

Title VII was invoked by Respondent Weber in this case not to authorize a remedy of either kind, but to foreclose one. Citing *Carter* v. *Gallagher* for the proposition—subsequently rejected in that case by the Eighth Circuit En Banc [18]—the Fifth Circuit held that Title VII prohibits preferential treatment of minorities not previously injured by the employer. In denying the petition for rehearing the Fifth Circuit sought to distinguish this case from *Carter* [19] but the conflict seems inescapable. A similar conflict exists with the Ninth Circuit which, relying on *Carter*, has held that "we do not believe that such [race-conscious] relief may be limited to identifiable persons denied employment in the past . . . ." [20]

Moreover, the Fifth Circuit in its decision below went on to impose this same prohibition on preferences for nonvictims to affirmative action programs adopted pursuant to Executive Order 11246. The Third Cir-

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[18] 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

[19] 571 F.2d at 337.

[20] Davis v. County of Los Angeles, 566 F.2d 1334, 1343 (9th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3780 (1978).

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cuit in *EEOC* v. *AT&T*,[21] recognized the fallacy of this proposition under the Executive Order.[22] That court declared that the Executive Order is:

> a valid effort by the government to assure utilization of all segments of society in the available labor pool for government contractors, entirely apart from Title VII. Certainly that broader governmental interest is sufficient in itself to justify *relief directed at classes rather than individual victims of discrimination.* (Emphasis added).

556 F.2d at 175.

B. The Fifth Circuit's Standard for Determining Whether Race-Conscious Employee Selections Should be Approved Conflicts with that Adopted by Other Courts of Appeals

Race-conscious employee selection procedures instituted under Executive Order 11246, or under a supplement to the Executive Order adopted by a state agency, have withstood complaints that they imposed

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[21] 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3803 (1978).

[22] Like Kaiser, AT&T denied that it had ever discriminated. 556 F.2d at 170. However, AT&T's denial and the absence of any findings of discrimination in the consent decree did not prevent the court from upholding the lawfulness of the racial classifications contained in the decree under Title VII as well as under the Executive Order. The court accepted the Government's allegations as being true for purposes of evaluating the remedy. Thus what distinguishes this case from *AT&T* is the absence of a party alleging past discrimination. If, however, voluntary use of racial classification in employment can only be sustained where the employer secures the intervention of a party who will charge it with past discrimination, affirmative action will be sharply reduced.

unlawful racial quotas in the First Circuit [23] and the Seventh Circuit [24] as well as the Third Circuit.[25] In each of these circuits, contractors challenged the racial employment programs prescribed for government construction work.[26] In each case the programs were upheld without any findings by the court that the complaining *employers* had ever discriminated against the minority employees.

Instead of insisting on evidence of discrimination by the employers represented in the litigation, as the Fifth Circuit did in this case, the First, Third and Seventh Circuits looked elsewhere to justify the racial programs. First they took note of administrative determinations that minorities were substantially underrepresented among the skilled craft employees hired by all contractors. Second they observed that such underrepresentation largely resulted from the historical exclusion of minority employees from the building trades unions which supplied craftsmen to the contractors.

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[23] Associated General Contractors of Massachusetts, Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).

[24] Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680 (7th Cir. 1972).

[25] Contractors Association of Eastern Pennsylvania v. Schultz, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

[26] The fact that the government has chosen to establish more specific and localized standards for affirmative action programs for construction contractors than for nonconstruction contractors is not legally significant. Nonconstruction contractors no less than construction contractors are required to adopt and make good faith efforts to achieve their affirmative action goals within the guidelines provided by the Office of Federal Contract Compliance. *See* discussion, *supra*, at pages 9-10.

Similar facts exist in this record: Prior to 1974, blacks constituted only 1.7 percent of the skilled craft employees hired by Kaiser in an area with a 39 percent black workforce. Both witnesses called by Kaiser attributed this disparity to the craft unions which had not trained or admitted black employees in the past.[27] Thus, under the legal standard used in three other Courts of Appeals, the affirmative action program instituted by Kaiser and the Steelworkers would not have been found to violate Title VII.[28]

CONCLUSION

For the reasons stated above, Kaiser respectfully requests this Court to grant its petition in this case for a Writ of Certiorari to the United States Court of Appeals for the Firth Circuit.

Respectfully submitted,

THOMPSON POWERS
JANE MCGREW
STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Of Counsel:

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300 Lakeside Drive
Oakland, Calif. 94643

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[27] Trial transcript at pp. 56, 102; Fifth Circuit Appendix at pp. 100, 146.

[28] While Mr. Justice Powell referred to these and other cases in *Regents of the University of California* v. *Bakke* as involving "determinations of past discrimination by the industries affected" 98 S.Ct. at 2754, there is no indication that particular contractors were any more responsible for such discrimination than was Kaiser for the situation at Gramercy.

Office of the Attorney General
Washington, D. C. 20530

January 9, 1979

MEMORANDUM FOR: Stuart Eizenstat,
Assistant to the President
for Domestic Affairs and Policy

FROM: J. Phillip Jordan, JPJ
Special Assistant to
the Attorney General

SUBJECT: Weber

Terry, Mike and I spoke with Judge Bell after our lunch with you. He agreed to the proposal of sending one copy of the draft brief to you, and relying upon you to discuss it with the others from whom the President wants advice.

In the envelope are the draft brief, the government's cert petition (with lower court opinions and appendix), and relevant portions of other cert petitions and amicus papers at the certiorari stage. (The government's will be the first brief on the merits, so far as we are aware.) The amicus curiae papers of the Government Contract Employers Association (attorney: Gerard C. Smetana) contained arguments against the position taken in the current draft of the government's brief. The other non-government papers included in this package basically argue for the same result as the government's brief.

Judge Bell may be calling you to personally reiterate the need for confidential treatment of these papers. He did say that he saw no problem in your contacting outside lawyers or others to discuss the case orally, so long as you did not indicate to them the government's proposed position (except, of course, insofar as it is reflected in the certiorari petition).

Any thoughts or questions should, of course, be addressed to me or to the Attorney General directly.

In perhaps an excess of caution, I would suggest that you not make any copies of the draft brief before talking to Judge Bell.

cc Fritts, To Stu, Bob Hass for collective comment. Do not circulate or copy J

Office of the Attorney General
Washington, D. C. 20530

MEMORANDUM TO: The President

SUBJECT: United States and EEOC v. Weber

This case has received much publicity as "another Bakke" since the Supreme Court agreed to review it last week. It differs from Bakke in that it involves employment rather than education, and the issues arise under Title VII rather than the Constitution. The Government, having intervened in the lower court, is a party instead of an amicus curiae, as in Bakke. Despite these differences, the case is akin to Bakke in its importance for affirmative action programs.

probably more important

The case arose because Kaiser Aluminum in 1973 recognized that blacks were under-represented in skilled craft positions at its Gramercy, Louisiana plant (about 2%). In its next collective bargaining agreement with the Steelworkers, Kaiser agreed that half the employees chosen for the training program in skilled craft positions would be black until black representation in those positions equaled the black representation in the local labor force (about 40%).

Mr. Weber, a white employee, sued when he was subsequently turned down for the training program even though he had more seniority than some blacks who were chosen. The court of appeals ruled in his favor on the ground the company had violated Title VII's prohibition of racial discrimination against "any individual" in admission to training programs. The court indicated Kaiser's program might have passed muster as a remedy for past discrimination against blacks at the plant, but no court had found such discrimination before the program was started and the court below found none.

The Solicitor General drafted the certiorari petition in consultation with the Civil Rights Division, the EEOC, and the Department of Labor. The petition suggested that the Supreme Court send the case back to the lower courts for supplementation of the record and reconsideration in light of Bakke, which was

decided subsequent to the decision below and contained discussion that could be relevant to the legality of Kaiser's program. (For instance, the prevailing opinions in Bakke indicated that the legality of an affirmative action program might turn on the presence of governmental findings of discrimination and governmental participation in developing the program. The Office of Federal Contract Compliance had made some findings concerning Kaiser's possible discrimination in the skilled craft positions which were not in the record and had recommended a remedial program similar to the one Kaiser adopted.) At least for now the Supreme Court has declined to adopt the Solicitor General's suggestion and has set the case for full consideration.

The Government's position on the merits of Kaiser's program has not been formulated. The Solicitor General has solicited suggestions for the brief from the same agencies which he consulted on the certiorari petition, plus the Civil Service Commission.

In the petition the Solicitor General argued that the court of appeals was too restrictive in requiring that Kaiser be found by a court to have discriminated against a minority before it could initiate affirmative remedial action. He contended that Kaiser should be able to institute programs to increase minority representation in certain positions if it could reasonably conclude that the current low level of representation would support a prima facie finding of discrimination. _/ As a matter of policy, the Solicitor General suggested that such "voluntary compliance" would further the purpose of Title VII without the expense, delay and rancor of litigation or government enforcement efforts.

The Solicitor General plans to reiterate in the brief this basic argument for "voluntary compliance," but he is less certain that Kaiser's particular affirmative action program can be sustained on the current record. Much of the evidence on which Kaiser might reasonably have based a conclusion that it

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_/ A prima facie finding, which shifts the burden to a defendant to prove it has not discriminated, is often based on a significantly lower minority representation in a particular job than in the pool from which workers are selected for the job.

was subject to a prima facie finding of discrimination was not introduced in the lower courts because the inquiry was not focused on the "voluntary compliance" analysis. In addition, Kaiser's program may be fatally flawed by its exclusionary, or "quota" nature: half the positions in the skilled craft training program were filled by blacks on the basis of relative seniority, with whites ineligible to compete. Even the recently adopted EEOC guidelines on Title VII, to which the Supreme Court will defer in some measure and which generally support the "voluntary compliance" concept, may not support a program like Kaiser's, at least in the absence of stronger evidentiary justification in the record.

If the brief does not support the Kaiser program the minorities will ignore its general support for "voluntary compliance" and assail the "symbolism" of our opposition to a program that was intended to help them. If the brief does support Kaiser's program we will be accused of supporting quotas.

The brief is due on January 20, 1979. I will keep you informed as it develops.

Griffin B. Bell

Griffin B. Bell
Attorney General

THE WHITE HOUSE
WASHINGTON

Cabinet. 1-15-79

> '80 budget. task force. 1/22 c/c
'79 agenda. VP
> Reors - no decisions yet Hamm Andrus Krepts
> Schultze 4-78 GNP ↑ > 5% 10% → 7% Wage
> Kahn - steel? Visible productivity effort
> Regulation - Doug - Diesel - Legislation
> Ethics legis
> VA savings - Ag, Meals, invoices, etc.
> Bella & women
> Energy - spot prices?
> ICC -

> PRC - Deng - MFN
> Iran - students - ~~Pot Pot~~
> Cambodia. Sihanouk - Pol Pot
> SALT - Cy & Harold
> M East - Is oil -
> Philippine Base

THE WHITE HOUSE
WASHINGTON

January 15, 1979

Charlie Schultze

The attached was returned in the President's outbox today and is forwarded to you for appropriate handling.

Rick Hutcheson

cc: Alfred Kahn

	FOR STAFFING
	FOR INFORMATION
✓	FROM PRESIDENT'S OUTBOX
	LOG IN/TO PRESIDENT TODAY
	IMMEDIATE TURNAROUND
	NO DEADLINE
	LAST DAY FOR ACTION

FOR ACTION	FYI	
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	ADMIN. CONFIDEN.
	CONFIDENTIAL
	SECRET
	EYES ONLY

THE CHAIRMAN OF THE
COUNCIL OF ECONOMIC ADVISERS
WASHINGTON

January 13, 1979

MEMORANDUM FOR THE PRESIDENT

From: Charlie Schultze CLS

Subject: Constitutional Amendment to Balance the Budget Every Year

A friend of mine has suggested an alternative version of the "Brown amendment" which is equally feasible and would do far less harm. I attach it for your perusal.

Attachment

JAN 9 1973

Charlie - this
Please clear
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PETITION

Whereas be it resolved that the people of the State (Commonwealth) of _____ upon due consideration do hereby proclaim the calling of a Constitutional convention for the purpose hereinunder promulgated:

Amendment to the Constitution of the United States: The Congress shall make no law, nor the President take such action, that would cause not to occur within any fiscal year, including such year as such action might be occasioned, the transformation of any and all four (4) sided objects bounded equally on each side and possessing at all interstices angles of ninety (90) degrees into continuous bounded objects, each of whose boundary perimeter points are equidistant from a point found at the intersection of two (2) straight lines bisecting straight lines formed by connecting any two (2) points on such perimeter.

OFFICE OF THE VICE PRESIDENT

WASHINGTON

January 15, 1979

NOTATION FOR: THE PRESIDENT

FROM: THE VICE PRESIDENT

As you will see, the paper that follows contains only two rather than three tiers of Presidential priority legislation.

For purposes of today's discussion, I thought it best to eliminate distinctions between the second and third tiers since they relate primarily to internal White House management and are likely to shift based on your notations on the last memorandum.

1979 AGENDA

STRONG PRESIDENTIAL INTEREST

Group 1

- o Anti-Inflation. Hospital Cost Containment, Real Wage Insurance, COWPS Reauthorization, Regulatory Reform.
- o Major Health Legislation. Beyond Hospital Costs, decisions must still be made on the national health initiative. (HEW recommends timing adjustments on Hospital Costs and National Health Plan.)
- o MTN/Countervailing Duties.
- o Budget.
- o SALT II.
- o Panama Implementing Legislation.
- o PRC Normalization/Taiwan Omnibus/Jackson-Vanik.
- o Department of Education and Possibly other Major Reorganizations.
- o Alaska D-2 Lands.

* * *

Group 2

- o National Development Bank and Countercyclical Revenue Sharing.
- o Welfare Reform/Child Welfare. (HEW and DOL urge flexibility on timing.)
- o Election Reform: Public Financing. (Justice Department recommends for Departmental Priority.)
- o Solar Energy Package (Primarily Budget).
- o Regulatory Reform: (also grouped with anti-inflation above). Includes: Surface Transportation Deregulation, Sunset and a regulatory reform bill to reduce delay, improve cost-effectiveness, increase public participation (fees for interveners) and authorize innovative techniques in regulatory development.
- o Clinch River Breeder Reactor.

STRONG PRESIDENTIAL INTEREST

Group 2 (cont...)

- o Lobby Reform. (Justice recommends for Departmental Priority).
- o Intelligence Charters. (Justice, CIA and DOD recommend for Departmental Priority.)
- o Middle East Assistance.
- o Federal Compensation Reform. (Includes White/Blue Collar and Military Compensation Reform).
- o Foreign Assistance.
- o Stanford Daily. (Justice recommends for Departmental Priority)
- o Privacy. (Medical, Bank and Credit Records) (Justice recommends for Departmental Priority)
- o Mental Health Amendments.

Additional Agency Recommendations

- o Agricultural Disaster Assistance Program Reform. (SBA) Moving farm disaster loan programs from SBA to USDA.

ADMINISTRATIVELY CONFIDENTIAL
1979 AGENDA

MUST PASS DEPARTMENTAL

- o FY 79 and FY 80 DOD Authorization and Appropriations Bills.
- o Sugar Legislation (price supports and ISA).
- o Extension/Expiration of 80% of parity milk price support floor.
- o Federal Crop Insurance/ (Plus 1 Year Extension of Disaster Payment Program - USDA.
- o Regulation Q Amendments.
- o Child Nutrition Program Reforms.
- o Nuclear Waste Management.
- o Saccharin Ban Prohibition/Food Safety. (HEW recommends late spring or early summer on timing)
- o Social Security and Disability Reforms. (HEW recommends sending disability reforms to the Congress on February 5, with other entitlement reductions to follow later)
- o Criminal Code Reform.
- o 1979 Rehabilitation Amendments.
- o Fair Housing Legislation.
- o Carryover Basis.
- o ACTION Reauthorization.
- o Office of Federal Inspector, Alaska Natural Gas Transportation System (DOE recommends for Strong Presidential Interest.)
- o Wagner-Peyser Act (Employment Service) Extension .
- o Veterans Legislative Package. (Readjustment counseling, alcohol and drug treatment amendments, and extension of GI bill for Vietnam Veterans)
- o Refugee Legislation.
- o Antitrust Legislation.

MUST PASS DEPARTMENTAL (cont...)

- o Public Works and Economic Development Act Extension.
- o Judicial Efficiency Package. (Diversity jurisdiction, civil priorities, arbitration, appeals court reforms, Supreme Court jurisdiction)
- o Reclamation Act Amendments.
- o Water Policy Initiatives.
- o Inland Energy Impact Assistance Legislation.
- o UN Assessed Contributions.
- o Treaty of Tlatelolco.
- o Turkish/Greek Military Arrangements.
- o Philippine Base Agreement.
- o IAEA Voluntary Offer.
- o NATO Standardization, Interoperability and Readiness.
- o Debt Limit Extension.

Additional Agency Recommendations

- o Consolidated Environmental Assistance Act of 1979 (EPA)
- o Shale Oil Tax Credit. (DOE)
- o Refiner Overcharges and Aid to the Poor and Elderly. (DOE)

DEPARTMENTAL PRIORITY

- o RARE II Legislative.
- o Meat and Poultry Inspection Reform.
- o International Emergency Wheat Reserve.
- o Small Business Act Amendments.
- o State Energy Management and Planning Act.
- o ERISA Amendments. (DOL recommends timing adjustment)
- o Home Mortgage Disclosure Act.
- o Drug Law Reform. (HEW recommends elevating to Must Pass Departmental)
- o Higher Education Act/NDEA Extensions.
- o Consolidation of Urban Mass Transit Administration and Federal Highway Administration.
- o Safe Drinking Water Act Reauthorization.
- o Coastal Zone Management Act Reauthorization.
- o National Heritage Program. (Interior recommends dropping from Priority status at the present time)
- o Endangered Species Act. (Interior recommends dropping from Priority status at the present time)
- o VA Vocational Rehabilitation Act Amendments.
- o LEAA.
- o Health Professions Education Act Amendments.
- o Health Planning Amendments.
- o Nuclear Siting and Licensing Legislation.
- o Deep Seabed Mining.
- o Toxic Substances Control Act Reauthorization.
- o Airport and Airway Development Act Extension.

DEPARTMENTAL PRIORITY (cont...)

- o UN Sanctions of Rhodesia. (State recommends elevation to Must Pass Departmental)
- o Major Arms Sales.
- o Korea.
- o IMF Quota Increase.
- o Commodity Agreements.
- o Extension of the Export Administration Act. (Commerce recommends elevation to Must Pass Departmental.
- o Renewal of Azores Base Agreement.
- o No Fault Auto Insurance.

Additional Agency Recommendations

- o Additional Disaster and Small Business Program Changes (SBA)
- o Trade Adjustment Assistance (STR)
- o Funding Mechanism for Clean-up of Hazardous Waste Sites (EPA)
- o Hazardous Waste Liability Insurance Fund (EPA)
- o Ocean Dumping Reauthorization (EPA)
- o Resource Conservation and Recovery Act Reauthorization (EPA)
- o Federal Insecticide, Fungicide and Rodenticide Reauthorization (EPA)
- o Noise Control Reauthorization (EPA)
- o Federal Water Pollution Control Act Reauthorization (EPA)
- o Environmental RD & D Act Reauthorization (EPA)
- o Defense Officer Personnel Management Act (DOD)

DEPARTMENTAL PRIORITY

Additional Agency Recommendations (cont...)

- o Oil Spill Liability and Compensation (OMB)
- o Regional Commissions (OMB)
- o Food Stamp Reforms (OMB)
- o National Health Service Corps (OMB)
- o Title XX, AFDC, SSI (OMB)
- o Child Support Enforcement (OMB)
- o HUD Authorizations (OMB)
- o Railroad Retirement Amendments (OMB)

PACING ADJUSTMENTS

- Oil Pricing
- Undocumented Aliens
- CTB
- Genocide and other Human Rights Conventions
- Labor Law Reform
- Other Reorganizations

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONERS

v.

BRIAN F. WEBER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WADE H. MCCREE, JR.,
Solicitor General,

DREW S. DAYS, III,
Assistant Attorney General,

ABNER W. SIBAL,
General Counsel,
Equal Employment Opportunity Commission,
Washington, D.C. 20506.

WILLIAM C. BRYSON,
Assistant to the Solicitor General

CARIN ANN CLAUSS,
Solicitor of Labor,
Department of Labor,
Washington, D.C. 20210.

BRIAN K. LANDSBERG,
ROBERT J. REINSTEIN,
Attorneys,
Department of Justice
Washington, D.C. 20530